

105.722

NEW JERSEY SUPREME COURT.

THE STATE,

VS

WILLIAM STEVENS, HENRY STEVENS,
HENRY CARPENDER, and FRANCES HALL,
Defendants.

On motion for foreign jury.

Before Justices Kalisch, Katzenbach and Lloyd.

For the Motion: Francis L. Bergen, Prosecutor of
the Pleas of Somerset County.

Alex Simpson, Assistant Attorney General.

Contra: Robert H. McCarter and Clarence H.
Case, Esqrs.

The opinion of the Court was delivered by
KALISCH, J.

The defendants were on September 15th, 1926, indicted by the Somerset County Grand Jury of the April Term, 1926, for the murder of Eleanor Mills. A like indictment was found against the same defendants for the murder of Edward W. Hall. The murders are alleged to have been committed on September 14th, 1922, in Somerset County. No one of the defendants is a resident of Somerset County.

It appears that a panel of two hundred and fifty petit jurors and a panel of one hundred and sixty struck jurors have been summoned by the Jury Commissioners of Somerset County for service during the September term, 1926. On behalf of the State, application is made to the Court, due notice of such application having been given to the attorneys of the defendants, for a foreign jury, under section 78 of the Criminal Procedure Act, 2 Comp. Stat. p. 1845, which reads as follows:

"The Supreme Court may in its discretion order trials by foreign juries in all criminal cases which may have been commenced in that Court, or may be removed to that court from any other court and whenever in their opinion a fair and impartial trial cannot be had before a jury of the county, upon motion in behalf of the State or on the part of any defendant, order any indictment found at any court of Oyer and Terminer, or at any Court of Quarter Sessions, to be tried by a foreign jury in the County in which such indictment was found."

On the argument the point was made by counsel of the defendants, that the Court was without jurisdiction to hear the motion, because the cause had not been first removed by writ of certiorari to the Supreme Court, and that this was essential to give the Court jurisdiction to deal with the matter. Inasmuch as counsel waived the objection and consented during the argument that the Court should hear and determine the application, it is not necessary to pass on the mooted question.

It is to be observed that, by virtue of the statute, the application is addressed to the discretionary power of the Court. This can mean no less than the exercise of sound judicial discretion. As was said in State vs. Dedge, unreported, this power should not be exercised unless the case is a clear one.